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February 5, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 88-2

Dear Ms. Dortch:

On January 23, 2003, representatives from BellSouth met with members of the Commission's Wireline Competition Bureau's staff. The purpose of the meeting was to discuss issues related to a petition ("Petition") BellSouth had filed for authorization to amend its Open Network Architecture Plan ("ONA Plan"). I sent you a written Notice of that meeting for filing in CC Docket No. 88-2 on January 24, 2003.

During the meeting on January 23, staff from the Telecommunications Access Policy Division raised the question of whether BellSouth also required authorization under Section 214 of the Communications Act of 1934, as amended, to discontinue its current offering of the functionalities and features at issue in the Petition. BellSouth believes that it does not need to file for such an authorization because, as BellSouth explains in more detail below, it is not unilaterally discontinuing, reducing or impairing service to a community or part of a community within the meaning of that statute.

In fact, for four of the six functionalities and features, BellSouth is simply reconfiguring dialing arrangements in response to action taken by the North American Numbering Plan Administrator ("NANPA"). The 1996 Act gave plenary authority to the FCC over the North American Numbering Plan ("NANP").¹ The FCC in turn designated NANPA to "administer telecommunications numbering and to

¹ 47 U.S.C. § 251(e)(1).

make such numbers available on an equitable basis" in fulfillment of its Congressional mandate.²

As explained in the Petition, NANPA, the neutral administrator appointed by the FCC pursuant to its plenary authority to administer telephone numbers, has ordered the return of "oddball" codes in order to make these numbering resources available for other uses. BellSouth has received a similar order from the Florida Public Service Commission, acting pursuant to delegated authority from the FCC pursuant to the 1996 Act. As a result, BellSouth has had to take steps to comply with these actions. In much the same manner as with an area code split, BellSouth has had to reconfigure dialing patterns and make available equivalent intrastate services using different dialing arrangements as replacements for the services that used the 203, 440, and 930 codes in Florida. As in the case of area code splits, BellSouth's customers, may, for example, have to accept number changes, reprogram existing CPE, and notify their own customers of their new telephone number. BellSouth has managed this process exactly as it would an area code split or any other changes to existing services through state tariff revisions.

For all six features and functionalities BellSouth is not discontinuing service within the meaning of the statute. BellSouth is making the same communications capability available through different tariff arrangements. As already mentioned, for the four changes occasioned by the NANPA recall of oddball NXX codes, BellSouth is simply reconfiguring dialing arrangements much as it would with any area code split. BellSouth will not be leaving any community or part of a community without service. BellSouth will continue to provide local exchange service to all markets affected by its ONA plan amendments, and is making available under local tariff functionally equivalent capabilities where there is still a market demand for the intrastate capabilities that were dependent on the recalled NANPA resources. Similarly, for the two functionalities for which it is constrained to amend its existing ONA Plan due to lack of market demand, BellSouth will continue to make available functionally equivalent services, as explained in the Petition, to the two customers affected, and indeed, to all the communities BellSouth serves, in both its federal and state tariffs.³

² *Id.*; *In the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, CC Docket No. 96-98, et al., Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19405 (1996).*

³ There are no longer any customers subscribing to BellSouth's Derived Data Channel Service, or DDCS.

This analytical approach is fully consistent with the language of the statute and the way the Commission and the courts have interpreted the discontinuance provisions of section 214. The legislative history makes clear that section 214's discontinuance provisions, added in 1943, were enacted to address the specific factual background of the telegraph industry, including the larger issue of non-Bell telegraph company mergers, and the "urgent military requirements" of the Second World War. Noting that Western Union and especially Postal Telegraph & Cable "suffered seriously from competition within the industry and from forms of communication other than telegraph," Congress concluded that the "Nation cannot afford to lose the telegraph service capacity represented by the facilities of" Postal, and that "the general economic situation of telegraph-industry employees, aggravated by a feeling of insecurity as to their employment in the industry, is not conducive to efficient wartime operations, especially when manpower demands from outside the industry are so intense."⁴ As one court later observed following the Western Union/Postal merger, "[t]he effect of Section 214 of the Communications Act of 1934, as amended, effective March 6, 1943, was to prevent Western Union from reducing the hours of service to these [various Ohio] communities, unless otherwise authorized by the Commission."⁵

When it has applied the requirements of section 214(a) to telecommunications carriers, the Commission has been careful to distinguish "tariff changes" from the "discontinuance of a service." When AT&T sought through a tariff revision to terminate its TELPAK service, by which bulk purchasers of private line services could receive service at relatively less expense than ordering an equivalent number of channels on an individual basis, the FCC held that section 214's discontinuance provisions did not apply because the termination of TELPAK constituted a tariff change rather than the discontinuance of a service. When this determination was challenged on appeal, the United States Circuit Court of Appeals reviewed the decision, and, according "great deference" to the FCC's interpretation of the statute, the Court agreed with the FCC's holding:

The termination of the TELPAK "service" did not in fact discontinue, reduce, or impair any service at all; all it did was eliminate a rate discount, thereby effectuating a rate increase. All the services which had been offered under the TELPAK tariff were still available thereafter from AT&T pursuant to other tariffs or other sections of the same tariff; only the rates differed. . . . Were we to accept petitioner's view, virtually every rate increase might be argued to be a discontinuance of "service" requiring a prior finding of convenience and necessity by the Commission. The attendant burdens would be enormous.

⁴ H. Rep. No. 69 (1943), *reprinted in* 1943 U.S. Cong. Serv. 2-3 - 2-4.

⁵ *Western Union Division v. United States*, 87 F. Supp. 324, 337 n.6 (D.Ct. D.C. 1949).

Likewise, such a construction would be at odds with the scheme of carrier-initiated tariff filings which is at the heart of the Communications Act.⁶

Similarly, if a carrier had to file a 214 discontinuance notice every time it had to reconfigure dialing arrangements for intrastate offerings as a result of actions taken by the NANPA, such as area code splits, or when there was a near absolute lack of market demand for a tariffed offering, there would be a "continuous stream of burdensome applications for Commission approval."⁷

In this case, the essential facts are that BellSouth is not discontinuing or impairing existing service to any communities or parts of communities; rather it is making necessary changes to four local intrastate offerings as a direct consequence of changes in federal numbering policy, and to two functionalities tariffed in both jurisdictions due to lack of market demand. BellSouth is in all cases providing functionally equivalent capabilities in lieu of the withdrawn offerings for affected customers. An ice cream parlor might experiment with different flavors, adding and subtracting to its basic menu, sometimes, perhaps, in response to a lack of available ingredients. Although parts of its menu might vary, the ice cream parlor still serves the community, providing multiple flavors of ice cream and acceptable substitutes for discontinued flavors. In BellSouth's case, it is no longer able to offer existing dialing arrangements in connection with four intrastate communications offerings described in the Petition because the central office codes currently used in their provision must be returned to the NANPA in accordance with Congress's plan for competitively neutral telephone number administration, as implemented by this Commission. BellSouth also has only two customers in two state jurisdictions for the other two capabilities discussed in the Petition, each of which can be provided through functionally equivalent alternative tariffed offerings. Nonetheless, BellSouth continues to stay in business, serving the same communities as it has before and offering alternative capabilities together with transition planning to those customers of tariffed intrastate offerings that were based on the old dialing arrangements.

Further indication that the changes discussed in the Petition are not the type of activity for which a section 214 application is contemplated comes from the express language of the statute itself. Section 214(a) explicitly states that no certificate is required for, among other things, lines within a single state, unless the line constitutes part of an interstate line. Further, the final *proviso* of section 214(a) states that "nothing in this section shall be construed to require a certificate or other authorization from the Commission for any . . . changes in . . . operation . . . which will not impair the adequacy or quality of service provided." The change in dialing patterns associated with the four wholly intrastate services is the sort of incidental operational change that is best effected through state legislative and regulatory

⁶ *Aeronautical Radio Inc., v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980).

⁷ *General Telephone Co. of Cal. v. FCC*, 413 F.2d 390, 403 (D.C. Cir. 1969) (in context of application for authority to construct).

schemes. In the case of the proposed amendments to BellSouth's ONA plan driven by the recent actions of NANPA and state commissions, BellSouth is simply offering functionally equivalent alternative intrastate communications capabilities based on alternative dialing arrangements occasioned by the NANPA's region-wide recall of a central office code. This wholly intrastate activity is neither a discontinuance nor an impairment of service as contemplated by the statute or the Commission.

With respect to the current BCLID and DDCS offerings, where BellSouth is constrained to modify its ONA Plan due to marketplace changes rather than as a direct result of the actions of the NANPA, the same analysis still holds. BellSouth is simply responding to market demand (more properly, lack of market demand) by discontinuing offerings for which there are extremely few takers.⁸ It is doing so through revisions to the federal and state tariffs, and in the process is making available functionally equivalent services. It is not abandoning a community, or any portion of community, or withdrawing from service, or reducing or impairing service. In the case of BCLID, while the "bulk" calling line identification detail will no longer be available with BCLID, Calling Line Identification Detail will continue to be available on an individual-line basis pursuant to tariff with BellSouth's Caller ID services.⁹ Here, the holding of *Aeronautical Radio* is directly on point. As explained above, in *Aeronautical Radio*, AT&T properly eliminated the tariffed bulk provision of certain private line services, but continued to make available individual services on a non-bulk basis. Similarly, here, BellSouth is eliminating by tariff the bulk delivery of calling line identification detail, but such detail will still be available, by tariff, on an individual basis. Similarly, DDCS, or Clear Access to Data Portion of Derived Channels and Data over Voice, are capabilities that can be satisfied with at least three other tariffed BellSouth services, as detailed in the Petition.¹⁰

Moreover, as with the other four capabilities that are the subject of the Petition, the changes necessitated by a lack of actual market demand are precisely the sort of changes that are best effected through the appropriate state or federal tariff process.¹¹ In the case of the proposed amendments to BellSouth's ONA plan

⁸ BCLID has two customers, one in Florida and one in Louisiana, while, as already noted, DDCS no longer has any customers.

⁹ See BellSouth's October 31, 2002 ONA Plan Amendment at 7. Again, there are only two customers for BCLID.

¹⁰ As mentioned earlier, BellSouth has no customers currently subscribing to DDCS.

¹¹ See, e.g., *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 374-75 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978) ("[T]he primary purpose of section 214(a) is prevention of unnecessary duplication of facilities, not regulation of services. . . . [T]he power to require prior agency approval is itself circumscribed, for it is well recognized that the tariff provisions of the Communications Act . . . embody a considered legislative judgment that carriers should in general be free to implement new rates or services over existing communications lines unless and until the

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driven by lack of market demand, BellSouth is offering functionally equivalent alternative tariff arrangements and is not discontinuing or impairing service within the meaning of the statute.

In accordance with Section 1.1206, I am filing this letter electronically and request that you place it in the record of the proceeding identified above. Thank you.

Sincerely,



Kathleen B. Levitz

cc: Ann Stevens
Brad Koerner
Judy Nitsche
Vienna Jordan
Cheryl Callahan
Jennifer Gorny

Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute.").